APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3486

D.C. Docket No. 90-20-CR-T-10A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

ROYAL BUICK, INC.,
DAVID ROEMER,
BRIAN SMITH,
RALPH RODRIGUEZ,
EDWIN MUGFORD, III,
EUGENE MARANO,

Defendants-Appellants.

Appeals from the United States
District Court for the
Middle District of Florida

(June 3, 1993)

Before FAY and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3486

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

ROYAL BUICK, INC.,
DAVID ROEMER,
BRIAN SMITH,
RALPH RODRIGUEZ,
EDWIN MUGFORD, III,
EUGENE MARANO,

Defendants-Appellants.

On Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion June 3, 1993, 11th Cir., 19__, ____F.2d____).

Before: FAY and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eight Circuit, sitting by designation.

UNITED STATES DISTRICT COURT

x

MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

JUDGEMENT IN A CRIMINAL CASE
Case No.: 90-20-CR.T-10(A)

EDWIN W. MUGFORD, III
10209 Swinging Bridge Dr.
Richmond, Virginia 23222

SSN: 230-17-0382

(Name and Address of Defendant)

THE DEFENDANT ENTERED A PLEA OF:

__ guilty nolo contendere as to count(s) _____.
and
__ not guilty as to count(s) _____.

THERE WAS A:
__ finding x verdict of guilty as to count(s) 1, 10, 19, and 49 .

THERE WAS A:
__ finding __ verdict of not guilty as to count(s) _____.
__ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

COUNT 1: Conspiracy to Defraud a Federally

Insured Financial Institution, 18 USC 371.

COUNT 10: Bank Fraud, 18 USC 1344.

COUNT 19: Mail Fraud, 18 USC 1341.

COUNT 49: False statements in the making of a loan Application, 18 USC 1014.

IT IS THE JUDGMENT OF THIS COURT THAT: IMPOSITION OF SENTENCE is suspended and defendant placed on probation for a period of THREE (3) YEARS as to Counts 1, 10, 19, and 49. Concurrently,and under the terms and general conditions of probation appearing on the reverse side of this judgment.

[EXCERPTS FROM]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO.
	:	90-21-Cr-
ROYAL BUICK, INC.	:	T-10(A)
BRIAN SMITH,	:	
RICK TAYLOR,	:	
KATHLEEN GERMAN,	:	
JOSEPH GLASGOW,	:	
VICTOR NOEL CHRISTMAS,	:	
JERRY WALKER,	:	
RALPH RODRIGUEZ,	:	
JOSEPH SCARBOROUGH,	:	
LEE TYLER,	:	
JOHN DELOACH, JR.	:	
THOMAS MCCARTHY,	:	
MICHAEL MCMILLEN,	:	
DAVID ROEMER,	:	
MARK MEARS,	:	
KEVIN SCOTT,	:	
EDWIN W. MUGFORD, III and	:	
EUGENE MARANO	:	

SUPERSEDING INDICTMENT

COUNT ONE

The Conspiracy Count

A. Introduction

The Grand Jury Charges:

At all times material to this

Indictment:

1. ROYAL BUICK CO., INC., (hereinafter ROYAL BUICK) was an automobile dealership engaging in the business of retail sales of new and used automobiles in Tampa, Florida.

2. BRIAN SMITH was general sales manager of ROYAL BUICK.

3. RICK TAYLOR, JOSEPH SCARBOROUGH, VICTOR NOEL CHRISTMAS, and JERRY WALKER were sales managers at ROYAL BUICK.

4. JOSEPH GLASGOW was a sales manager and used car manager at ROYAL BUICK.

5. RALPH RODRIGUEZ was a sales manager and finance manager at ROYAL BUICK.

6. MICHAEL MCMILLEN, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III and EUGENE MARANO were

salesmen at ROYAL BUICK.

7. Florida National Bank (FNB) was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

8. KATHLEEN GERMAN was a loan officer at FNB.

9. A large number of ROYAL BUICK's customers obtained automobile financing from FNB during 1985 and 1986.

B. The Conspiracy

10. That from on or about January, 1985 and continuing thereafter until on or about August, 1986, in the Middle District of Florida, the defendants, ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SC[illegible]BOROUGH, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK

MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III and EUGENE MARANO,

did willfully and knowingly, combine, conspire, confederate and agree with each other and with others to the grand jury known and unknown, to commit offenses against the United States, that is:

a. To execute a scheme or artifice to defraud a federally insured financial institution, in violation of Title 18, United States Code, Section 1344;

b. To use the mails in execution of a scheme to defraud, in violation of Title 18, United States Code, Section 1341;

c. To make false statements on loan applications submitted to a federally insured bank, in violation of Title 18, Unites States Code, Section 1014.

d. To give or offer

something of value to an officer of a federally insured bank with the intent to influence and reward said officer in connection with the business of the bank, in violation of Title 18, United States Code, Section 215.

e. To misapply the funds of a federally insured bank, in violation of Title 18, United States Code, Section 656.

C. The Methods and Means of the Conspiracy

11. It was a part of said conspiracy that ROYAL BUICK would and did reward its sales managers and salesmen for making large numbers of sales and established quotas for sales on a monthly basis.

12. It was a part of said conspiracy that the defendants employed at ROYAL BUICK would and did cause advertisements

to be placed in local newspapers in order to entice low income customers with poor credit or not credit to call a certain telephone number for the purpose of buying an automobile. One of the advertisements urged potential customers to ask for "Betty Moses." The phone number was that of ROYAL BUICK and "Betty Moses" was a fictitious ROYAL BUICK sales person.

13. It was a further part of said conspiracy that receptionists at ROYAL BUICK would and did direct customers calling for "Betty Moses" to a salesman or sales manager.

14. It was a further part of said conspiracy that the defendant managers at ROYAL BUICK would and did counsel and advise salesmen regarding the preparation of false and misleading loan applications.

15. It was a further part of said conspiracy that the defendants employed at

ROYAL BUICK would and did make and cause to be made false statements and representations on loan applications of customers so that those customers with poor credit would appear to be qualified for automobile loans.

16. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did conceal information relating to items "added on" to the price of automobiles from customers as well as information regarding supposed "rebates" to the purchasers.

17. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did conceal from FNB the fact that many customers applying for automobile loans had not made down payments.

18. It was a further part of said conspiracy that the defendants would and

did conclude the sale of a substantial number of automobiles in order that the loan proceeds from FNB would be obtained by ROYAL BUICK and the defendants employed at ROYAL BUICK would receive commissions, bonuses and promotions.

19. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did entertain and give things of value to KATHLEEN GERMAN for the purpose of influencing her in connection with her duties at FNB.

20. It was a further part of said conspiracy that KATHLEEN GERMAN, at the request of other defendants, would and did approve a large number of loan applications from ROYAL BUICK without making adequate credit checks, knowing that the customers were bad credit risks, that false statements and representations had been made on the applications, and

that some applications had been rejected on earlier occasions by other loan officers.

21. It was a further part of said conspiracy that KATHLEEN GERMAN would and did conceal from other bank officers at FNB the fact that she had approved a substantial number of loan applications that should not have been approved.

22. It was a further part of said conspiracy that the defendants employed at ROYAL BUICK would and did cause at least 200 loan applications containing false statements and representations to be submitted to FNB knowing that many of the loans made by said bank would go into default and the automobiles would be repossessed from the customers.

23. It was a further part of said conspiracy that ROYAL BUICK would and did purchase many of the repossessed

automobiles from FNB which were then sold again to new customers with poor credit who obtained loans from FNB which were approved by KATHLEEN GERMAN.

D. Overt Acts

24. In order to accomplish the objects of the conspiracy, the following overt acts, among others, were committed in the Middle District of Florida:

[Extraneous material deleted]

(21) In February, 1986, EDWIN W. MUGFORD, III had a conversation with a ROYAL BUICK customer.

[Extraneous material deleted]

In violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FOURTEEN

The Bank Fraud Counts

1. The allegations of Section A of Count One are repeated and realleged as if

fully set forth herein.

2. That from on or about January, 1985 to on or about August, 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SCARBOROUGH, LEE TYLER, JOHN DELOACH, JR., THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD and EUGENE MARANO,

did knowingly and willfully execute and attempt to execute a scheme and artifice to defraud Florida National Bank, a federally insured financial institution, and for obtaining money and funds owned by and under the custody and control of Florida National Bank by means of false and fraudulent pretenses, representations, and promises.

3. The method and means of the scheme and artifice to defraud are set

forth in Section C of Count One, the allegations of which are repeated and realleged as if fully set forth herein.

4. On or about the dates listed below, for the purpose of executing the aforementioned scheme and artifice to defraud, the defendants knowingly caused false loan applications for the customers listed below to be submitted to FNB:

[Extraneous material deleted]

COUNT	DATE	CUSTOMER	APPROXIMATE LOAN AMOUNT
[Extraneous material deleted]			
10	05/24/86	Shelby Pryor	10,673

[Extraneous material deleted]

COUNTS FIFTEEN THROUGH THIRTY-TWO

The Mail Fraud Counts

1. The allegations of Section A of Count One are repeated and realleged as if fully set forth herein.

2. That from on or about January,

1985 to on or about August 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK, INC., BRIAN SMITH, RICK TAYLOR, KATHLEEN GERMAN, JOSEPH GLASGOW, VICTOR NOEL CHRISTMAS, JERRY WALKER, RALPH RODRIGUEZ, JOSEPH SCARBOROUGH, LEE TYLER, JOHN DELOACH, JR., RICHARD GIANCOLA, THOMAS MCCARTHY, MICHAEL MCMILLEN, DAVID ROEMER, MARK MEARS, KEVIN SCOTT, EDWIN W. MUGFORD, III AND EUGENE MARANO,

did knowingly and willfully devise and intend to devise a scheme and artifice to defraud Florida National Bank and customers of ROYAL BUICK and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and the concealment of material facts.

3. The method and means of the scheme and artifice to defraud are set forth in Section C of Count one, the allegations of which are repeated and realleged as if fully set forth herein.

4. On or about the dates listed below, for the purpose of executing the aforementioned scheme and artifice to defraud and attempting to do so, the defendants did knowingly cause to be delivered by the United States Postal Service, according to the directions thereon, the matter described below:

[Extraneous material deleted]

COUNT 18 August, 1986 Automobile Title in the name of Samuel Caperton, Tallahassee, Florida to Orlando, Florida

[Extraneous material deleted]

In violation of Title 18, United States Code, Section 1014.

[Extraneous material deleted]

COUNT FORTY-NINE

That on or about April 4, 1986, in the Middle District of Florida, the defendants,

ROYAL BUICK
and
EDWIN W. MUGFORD, III

did knowingly make and cause to be made a false material statement in an application for an automobile loan in the amount of approximately $10,600.00 from Florida National Bank of Tampa, Florida, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, for a ROYAL BUICK customer named Tracey Kenty, for the purpose of influencing said bank, in that the defendants caused said loan application to reflect that:

1. Tracey Kenty had a checking account at Sun Bank. Whereas, as the defendants then and there well knew:

1. Tracey Kenty did not have a checking account at Sun Bank.

In violation of Title 18, United States Code, Section 1014.

COUNT FIFTY

That on or about June 16, 1986, in the Middle District of Florida, the

defendants,

ROYAL BUICK
and
EDWIN W. MUGFORD, III,

did knowingly make and cause to be made a false material statement in an application for an automobile loan in the amount of approximately $8,836 from Florida National Bank of Tampa, Florida, a bank the deposits of which were insured by the Federal Deposit Insurance Corporation, for ROYAL BUICK customer named Jeffrey Mosley, for the purpose of influencing said bank, in that the defendants caused said loan application to reflect that:

1. Jeffrey Mosley had a checking account at Sun Bank. Whereas, as the defendants then and there well knew:

1. Jeffrey Mosley did not have a checking account at Sun Bank.

In violation of Title 18, United States Code, Section 1014.

[Extraneous material deleted]

A TRUE BILL,

_____
FOREMAN

ROBERT W. GENZMAN
United States Attorney

By: _____
JAMES L. POWERS
Assistant United States Attorney
Chief, Major Fraud Section

By: _____
JULIA M. HYMAN
Assistant United States Attorney

Federal Rules of Civil Procedure

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and infurtherance of the conspiracy.

(As amended Pub.L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all

as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Title 18 U.S.C.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1014. Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under section 1131-

1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, A federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell dispose of, loan, exchange,

alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1344. Bank Fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means-

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.